United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Docket No. 76-6038

IN THE
United States Court of Appeals
For the Second Circuit

JOSEPH ANTHONY CAMIRE, Infant, by his Father, JAMES ANTHONY CAMIRE and his Mother, GAIL MARIE CAMIRE, and JAMES ANTHONY CAMIRE and GAIL MARIE CAMIRE, Individually,

Appellants,

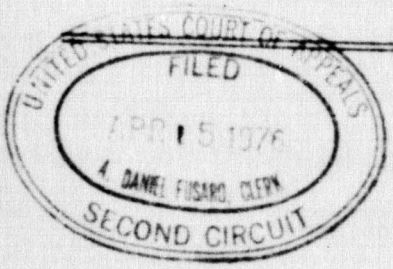
— *against* —

UNITED STATES OF AMERICA,

Appellee.

On appeal from the United States District Court
for the Northern District of New York

BRIEF OF THE APPELLEE



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STATEMENT OF ISSUES

I. ARE THE APPELLANTS' SEVERAL CLAIMS FOR RELIEF AGAINST THE APPELLEE FOREVER BARRED BY THE APPLICABLE, JURISDICTIONAL, FEDERAL STATUTE OF LIMITATIONS, TITLE 28, UNITED STATES CODE, SECTION 2401(b), ON ACCOUNT OF APPELLANTS' FAILURE TO PRESENT A WRITTEN TORT CLAIM TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THESE CLAIMS ACCRUED.

II. WAS THE APPELLANTS' COMPLAINT PROPERLY DISMISSED, WITH PREJUDICE, BY THE U. S. DISTRICT COURT, FOR LACK OF JURISDICTION IN THAT COURT, UPON MOTION OF THE APPELLEE, PURSUANT TO RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

STATEMENT OF THE CASE

The Infant Appellant, JOSEPH ANTHONY CAMIRE, was born on November 27, 1970 in the Plattsburgh, New York Air Force Base Hospital, a medical facility, owned, operated and maintained by the Appellee, UNITED STATES OF AMERICA, acting through its Department of the Air Force, and located in the Northern District of New York. The infant's father, JAMES A. CAMIRE, was then on active duty in the military service of the Appellee and remained on this active duty until his release therefrom on February 16, 1973. (R. 30-31).

On or about April 15, 1971, the Appellants claim that the infant was admitted for diagnostic, pediatric medical care and treatment to this hospital. During this admission, the infant allegedly demonstrated certain readily identifiable symptoms, including, high fever, vomiting, convulsions, rigidity of neck muscles, and persistent crying. During that admission, the infant was also allegedly seen by Donald Marger, M. D.,[1/] a former Captain and staff physician, then employed by the United States Air Force and assigned to that medical facility.

Despite the infant's display of these rather grave and extraordinary symptoms, the Appellants further aver that Dr. Marger diagnosed and treated the infant's

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[1/] Captain Donald Marger, M. D., was originally named as an individual party defendant in this Federal Tort Claims Act suit. However, at oral argument of the government's motion to dismiss, the Appellants consented to the District Court's dropping Dr. Marger as a party defendant and dismissing the Complaint against him. (R. 112-113, and 2).

condition as simply his cutting teeth and having a common cold. (R. 31). This physician's same, alleged diagnosis and treatment continued on two subsequent admissions of the infant.

On or about April 22, 1971, the Appellants further contend that GAIL MARIE CAMIRE was advised by Dr. Marger that a trip to California would not adversely affect the child's health. (R. 32).

Upon the Appellants' arrival in California, the infant allegedly suffered another convulsion, exhibited the identical symptoms described above, and was thereupon admitted to the San Diego, California Naval Hospital, another medical facility, owned, operated and maintained by the Appellee, on April 27, 1971. At this time, the child's condition was immediately diagnosed as an advanced form of meningitis. (R. 21, 32 and 90).

On or about January 17, 1974, the appropriate Federal agency, the Department of the Air Force, received the Appellants' written, administrative tort claim, in the amount of $4,000,000.00, consisting of the infant's personal injury claims and the derivative claims of his natural parents. The Appellants' claim was denied, as untimely, by that Federal Department on August 9, 1974, and this action was commenced within six months thereafter against the Appellee, UNITED STATES OF AMERICA. (R. 33, 22-28, and 106).

ARGUMENT

POINT I

THE APPELLANTS' SEVERAL CLAIMS FOR RELIEF AGAINST THE APPELLEE ARE FOREVER BARRED BY THE APPLICABLE, JURISDICTIONAL, FEDERAL STATUTE OF LIMITATIONS, TITLE 28, UNITED STATES CODE, SECTION 2401(b), ON ACCOUNT OF APPELLANTS' FAILURE TO PRESENT A WRITTEN TORT CLAIM TO THE APROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THESE CLAIMS ACCRUED.

Title 28, United States Code, Section 2401(b)(1966), provides, in pertinent part,

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues....

As the Appellants readily concede, (Appellants' Brief at page 5), federal law determines when a "claim accrues" within the meaning of this statute. The statute is not merely procedural in nature, but rather, "imposes as a jurisdictional prerequisite to recovery, a substantive condition, qualification, or restriction on both the right and remedy of the plaintiff and on the suability of the United States." Kossick v. United States, 330 F. 2d 933, 935 (2d Cir. 1964), cert. den., 379 U. S. 837 (1964).

See also: Quinton v. United States, 304 F. 2d 234 (5th Cir. 1962); and Hungerford v. United States, 307 F. 2d 99 (9th Cir. 1962).

Thus, if an administrative tort claim has not been filed with the "appropriate Federal agency", in this case, the Department of the Air Force, within two

years of the accrual of a plaintiff's claim(s) for relief, the U. S. District Court lacks jurisdiction to entertain a plaintiff's civil negligence action against the sovereign, UNITED STATES OF AMERICA, for the alleged wrongful conduct of its officers, agents and employees.

In the present case, it is admitted, for the purpose of a motion to dismiss, that an administrative tort claim, submitted on behalf of the Appellants herein, was received by the Department of the Air Force on or about January 17, 1974, that the alleged medical malpractice occurred in April, 1971, and that Appellants' administrative claim was denied, in writing, as untimely, by that Federal Department on August 9, 1974. (R. 31-33, 22-28, and 106). The primary issue before the Circuit Court, therefore, is reduced to its determination of when the Appellants' "claim accrued" within the meaning of this federal statute.

In Quinton v. United States, supra., at page 235, the Fifth Circuit held that,

> . . . under federal law, a malpractice action against the United States can be maintained within two years after the claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based.

The holding of that Circuit Court has been adopted by the Second Circuit in Kossick v. United States, supra., at page 935.

See also: Hungerford v. United States, supra.; Coyne v. United States, 411 F.2d 987 (5th Cir. 1969); Beech v. United States, 345 F.2d 872 (5th Cir. 1965); Ashley v. United States, 413 F.2d 490 (9th Cir. 1969); and Morano v. United States Naval Hospital, 437 F.2d 1009 (3rd Cir. 1971).

This statute is not tolled during the infancy of the Appellant, JOSEPH ANTHONY CAMIRE. Pittmen v. United States, 341 F.2d 739 (9th Cir. 1965), cert. den., 382 U.S. 941 (1965).

See also: Mann v. United States, 399 F.2d 672 (9th Cir. 1968); and Brown v. United States, 353 F.2d 578 (9th Cir. 1965).

The Appellee has always maintained that the Appellants, more particularly, Appellant, GAIL MARIE CAMIRE, "discovered, or in the exercise of reasonable diligence should have discovered" the alleged acts of malpractice and misdiagnosis of Donald Marger, M.D., the only acts of negligence which have been alleged, which would be attributable to the Appellee under the provisions of the Federal Tort Claims Act, Title 28, United States Code, Sections 2671 et seq., and which concluded on or about April 22, 1971, on, or soon after, April 27, 1971, when the Infant was admitted to the San Diego Naval Hospital. Immediately upon admission, and less than one week after the alleged, earlier misdiagnosis of the Infant's cutting teeth and having a common cold, the child's true medical condition was properly diagnosed as an advanced form of meningitis. (R. 16-17, 24, 32 and 90, and A. 13 - 14).

It is important to emphasize to the Circuit Court that before the Appellants were fully alerted to the affirmative defense that the Appellee would raise in this action, the Appellants stated certain facts, under oath, in their administrative tort claim and in their pleadings, (R. 22-26, and 30-35), but after the government's defense was raised and was clearly presented to the Appellants and to the District Court, these same "facts" were substantially altered by the Appellants in their opposing Affidavits. (R. 36-41 and 45-46). These inconsistencies in the Appellants' conflicting allegations did not go unnoticed by the District Court in its dismissal of their Complaint. (R. 3-4).

The District Court further concluded that the "blameless ignorance" exception was inapplicable to the Appellants on account of their lack of due diligence in ascertaining whether spinal meningitis, with its paralyzing sequelae, was significantly different from a common cold, since as early as April, 1971, the Appellants had knowledge of facts "sufficient to alert a reasonable person that there may have been negligence." Urie v. Thompson, 337 U.S. 163, 170 (1949). (R. 9).

See also: Reilly v. United States, 513 F.2d 147, 149-150 (8th Cir. 1975), and cases cited therein.

The Appellants now contend that this "change in the facts" was caused by the non-availability of the Infant's hospital records at the time of the Appellants' execution of both their Notice of Claim and their Complaint. As previously noted, both documents were executed by the Appellants under oath and under the penalty of perjury.

As is evidenced by the correspondence included in the Appendix of the Appellee, however, at least part of the medical and hospital records of the Infant were furnished to Appellants, in compliance with the Appellants' Attorney's written request of August 28, 1974, (A. 16 and 17), by the Department of the Air Force on or about September 23, 1974. (The Appellants' Complaint was verified on November 9, 1974. R. 35).

Assuming arguendo that these hospital and medical records were relevant to Appellants' change in the material facts, this correspondence clearly defeats Appellants' latest attempts to rationalize their inconsistencies.

Although only incompletely presented by the Appellants to the District Court during oral argument, (R. 124), the Appellants maintain that the District Court "disregarded the pronouncements" of the Sixth Circuit in Jordan v. United States, 503 F.2d 620 (6th Cir. 1974). (Appellants' Brief at page 9).

In Jordan, supra., at page 623, that Circuit Court noted that the District Court for the Eastern District of Michigan had relied upon the language of Brown vs. United States, supra., at page 580, establishing a "reasonable man" standard or test. That test has also been accepted by the District Court below. (R. 8-9).

The Sixth Circuit, although not flatly rejecting the Ninth Circuit's test, certainly expressed its objections to that Circuit's objective standard. With a split of authority between federal appellate courts, and a lack of controlling law in this Circuit, the District Court, below, could properly follow the aforementioned rule of law of the Ninth Circuit, which the District Court deemed more correct. 2/

Even if the Jordan standard, quoted by Appellants at page 9 of their Brief, was applied to this case, it is respectfully submitted that these Appellants would still remain without any justiciable causes of action.

Appellant, GAIL MARIE CAMIRE, was presumably concerned enough about the health of her child in April, 1971, to allegedly bring the Infant to the Plattsburgh Air Force Base Hospital on three separate occasions during that same month. (R. 31-32). Since the Infant allegedly continued to demonstrate exactly the same, grave symptoms, that Appellant soon thereafter sought another opinion from a different medical staff at a different medical facility. That Appellant was immediately advised that, instead of a common cold, her child had an advanced form of spinal meningitis. (R. 32).

2/ In Kossick, supra., at page 935, the Second Circuit specifically adopted the medical malpractice principles of the Ninth Circuit, citing Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962). The Hungerford case was similarly relied upon by the District Court below. (R. 5).

Whether the specific form of meningitis was diagnosed at that time would be irrelevant to either standard.

Prior to the last date the Appellants' claims could have accrued within the limitations of Section 2401(b), that is, January 18, 1972, the adverse sequelae of the meningitis, including seizures, paralysis, partial blindness, and deafness, had already clearly manifested themselves to Appellants. (R. 51-56, and 59-94). In light of the alleged earlier misdiagnosis of Dr. Marger, and the severe sequelae resulting from the meningitis, the Appellants should have reasonably concluded, prior to January 18, 1972, that an act of medical malpractice might have occurred on the part of Dr. Marger and should have taken all appropriate steps to protect their legal rights and remedies. Their claimed "ignorance" falls far short of being "blameless".

The Appellants have additionally attempted to justify their untimeliness in the filing of their administrative claim, by their reliance upon the "continuous treatment" exception, annunciated by the New York State Court of Appeals in Borgia v. City of New York, 12 N.Y. 2d 151 (1962), and referred to by the Second Circuit, in its dicta, in Kossick v. United States, supra.

In Borgia v. City of New York, supra., at page 155, that Court established this exception by holding that,

> . . . [W]hen the course of treatment which includes the wrongful act or ommissions has run continuously and is related to the same condition or complaint, the 'accrual' comes only at the end of the treatment.

More recently, however, that same Court has begun to significantly limit the scope of that doctrine by restricting its application to clearly continuous, as opposed to intermittent, medical services by the wrongdoing physician or hospital. Davis v. City of New York, 38 N.Y. 2d 257, 259-260 (1975).

The District Court below fully considered and rejected the "continuous treatment" exception, that has been established to protect an ongoing, frequent medical relationship between the patient and the alleged wrongdoing hospital or physician, as being inapplicable to these Appellants. (R. 7-9).

In the present case, the Infant was last seen by the only alleged tortfeasor, Donald Marger, M. D., on or about April 22, 1971. There are no allegations of subsequent, negligent or wrongful acts by any other agents, officers or employees of the Appellee. (R. 30-34).

The Infant was treated periodically thereafter, by other medical personnel, employed by the Appellee, at its San Diego Naval, and Plattsburgh Air Force Base Hospitals, for the alleviation of the sequelae of the child's meningitis. That government care lasted until the Appellant, JAMES ANTHONY CAMIRE, was released from active military service on or about February 16, 1973. (R. 31 and 33).

In affirming the District Court's granting of the government's motion for summary judgment, dismissing the complaint under 28 U. S. C. §2401(b), this Circuit Court stated, in its dicta, in Kossick v. United States, supra., at page 936,

> But the period when such considerations remained pertinent expired at the latest when Kossick was discharged after the last surgical attention to his injury in November, 1952, and nothing more in the way of remedy could be accomplished. It would be unreasonable to postpone the beginning of the limitation period so long as Kossick exercised his statutory right to demand further treatment at the Hospital, 42 U. S. C. §249 — a period that will never expire so long as he is a seaman.

> We add that we seriously doubt whether in applying the New York two year statute of limitations for malpractice §50(1) of the Civil Practice Act and §214(6) of the new Civil Practice Law and Rules, the New York courts would reach any different result in a case like Kossick's. None of the new York 'continuous treatment' cases that have been cited to us presented the question whether merely occasional hospital visits at substantial intervals, and these for examination or minor treatment to alleviate sequelae of the injury rather than for further cure, would prevent accrual of the claim.

Applying the two, aforementioned "federal" exceptions to the "continous treatment" doctrine, namely, (1) the indefinite availability to a plaintiff of free, governmental medical care, and (2) the non-negligent examination and minor treatment by the defendant of the sequelae of the malpractice, the present Appellants fall outside the protection of this doctrine under both exceptions.

Lacking any controlling authority in the Second Circuit, the District Court followed the holding of the Ninth Circuit in Brown v. United States, supra., a case that is closely analogous to the present one. That Circuit Court stated, at page 580, of its opinion,

> Finally, we deal with appellants' contention that the statute of limitations does not run against the claimant so long as the physician-patient relationship continued. Assuming such a rule to be properly applicable to a claim under the Federal Tort Claims Act, it has no place in the framework of the case at bar. The oxygen was administered by doctors in the naval hospital at Corpus

> Christi. When the child's treatment by those particular doctors terminated, the personal physician-patient relationship also came to an end. The parents then took the child to Bethesda Naval Hospital where different physicians informed them forthrightly and more precisely as to the child's condition and the cause. The reason for the rule which appellants advance is that one is presumed to repose confidence in the individual doctor to whom he entrusts his medical problems and that the confidential relationship excuses the making of inquiry which questions the care which has been or is being given during the existence of the relationship.
>
> We cannot accept the proposition that one who continues to receive treatment from succeeding government physicians is, regardless of the circumstances, excused from conducting diligent inquiry into the conduct of a doctor with whom the personal relationship has been terminated and who is not claimed to have acted in direct concert with the succeeding physicians.

See also: Ashley v. United States, supra.; Ciccarone v. United States, 486 F. 2d 253 (3rd Cir. 1973); Accardi v. United States, 372 F. Supp. 205 (S. D. N. Y. 1974); and Reilly v. United States, supra.

POINT II

THE APPELLANTS' COMPLAINT WAS PROPERLY DISMISSED, WITH PREJUDICE, BY THE U.S. DISTRICT COURT, FOR LACK OF JURISDICTION IN THAT COURT, UPON MOTION OF THE APPELLEE, PURSUANT TO RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

As the United States Supreme Court has stated in Jenkins v. McKeithen, 395 U. S. 411, 423 (1969), "For the purpose of a motion to dismiss, the material allegations of the complaint are taken as admitted." (Cites omitted).

Normally, it is the defendant, who attempts to defeat the plaintiff's claim, by the former's introduction of facts outside the latter's pleadings. In this case, the Appellee and the District Court have relied solely upon the allegations of the Plaintiffs' Verified Complaint to defeat the Appellants' several claims for relief, (R. 30-35, 13-15, and 3-4), and the Appellants have attempted to "clarify" their earlier averments by ex post facto, inconsistent Affidavits, purportedly based upon newly acquired medical records. (R. 36-41, and 45-46, and Appellants' Brief at pages 6-7). As previously discussed, however, even if all the hospital and medical records of the Infant were unavailable to the Appellants prior to the Notice of Claim and their Complaint, these medical records are compatible with the Appellants' original pleadings and not with their subsequent Affidavits.

The Appellants drafted their original pleadings and verified the contents of their Complaint under oath. Now that the government has raised its affirmative defense to these pleadings, the Appellants should be estopped from denying their own earlier allegations.

Since the absence of the District Court's subject matter jurisdiction was clear from the material averments of the Appellants' pleadings, the District Court's Order, granting the Appellee's motion to dismiss, on account of the Complaint's failure to state any claims upon which relief could be granted, was proper.

In Kossick v. United States, supra, this Circuit Court affirmed the District Court's Order, granting the government's motion for summary judgment, under 28 U. S. C. §2401(b). In that case, the motion was predicated upon the defendant's Affidavits. In the present case, the government has relied exclusively upon the Appellants' own statements to defeat their several claims for relief. A trial or hearing on the issue of "discovery" would serve no valid purpose but would merely encourage and condone more inconsistent testimony. The District Court below, the trier of all issues of fact and law in a Federal Tort Claims Act suit under 28 U. S. C. §2402 (1954), has already implicitly ruled upon the credibility of these Appellants by rejecting their self-serving, ex post facto Affidavits. (R. 3-4, and Appellants' Brief at page 10).

Other Federal Circuit and District Courts, when presented with similar issues, have also ruled that motions to dismiss, and motions for summary judgment, under 28 U. S. C. §2401(b), are appropriate manners of disposition of untimely, medical malpractice suits against the UNITED STATES OF AMERICA.

See: Ashley v. United States, supra; Schaefer v. United States, 288 F. Supp. 93 (E. D. Mo. 1968); and Hammond v. United States, 388 F. Supp. 928 (E. D. N. Y. 1975).

CONCLUSION

For all the foregoing reasons, the Order of the United States District Court for the Northern District of New York, dated October 9, 1975, and dismissing the plaintiffs' complaint with prejudice, should be in all respects affirmed.

Respectfully submitted,

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April 12, 1976

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State of New York)
County of Onondaga) ss.:
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Attorney(x) for **Appellee**

(x) he personally served three (2) copies of the printed ☐ Record ☒ Brief ☒ Appendix of the above entitled case addressed to:

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Attorney At Law
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Everett J. Rea

Everett J. Rea

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Thomas J. Stutz

~~Notary Public~~
Commissioner of Deeds

cc: James M. Sullivan, Jr., Esq.